



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**MEMORANDUM**

**TO:** THE COMMISSION  
STAFF DIRECTOR  
GENERAL COUNSEL  
FEC PRESS OFFICE  
FEC PUBLIC DISCLOSURE

**FROM:** COMMISSION SECRETARY *MWD*

**DATE:** NOVEMBER 1, 2006

**SUBJECT:** COMMENT ON DRAFT AO 2006-30

Transmitted herewith is a timely submitted comment by Neil Reiff, Counsel for ActBlue, regarding the above-captioned matter.

Proposed Advisory Opinion 2006-30 is on the agenda for Thursday, November 2, 2006.

Attachment

## SANDLER, REIFF &amp; YOUNG, P.C.

50 E STREET, S.E., SUITE 300

WASHINGTON, DC 20003

JOSEPH E. SANDLER  
sandler@sandlerreiff.com  
NEIL P. REIFF  
reiff@sandlerreiff.com

COUNSEL:  
JOHN HARDIN YOUNG  
young@sandlerreiff.com

TELEPHONE: (202) 479-1111

FACSIMILE: (202) 479-1115

November 1, 2006

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT  
2006 NOV -1 A 10:56

Mr. Lawrence Norton  
General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

RE: AOR 2006-30

Dear Mr. Norton:

This letter is a comment to Draft Advisory Opinion 2006-30 and is submitted pursuant to the Commission's comment procedures by the Requestor, through Counsel.

The Draft Advisory Opinion distinguishes our request from the fact-pattern of Advisory Opinions 1977-16, 1982-23 and 2003-23 on the grounds that the name of the "Prospective Candidate" would be known and that, therefore, contributions must be forwarded within 10 days of receipt. This distinction is based almost entirely on the fact that the Commission's regulations "recognize that an individual may receive contributions before becoming a candidate." Draft Advisory Opinion 2006-30, page 5, lines 13-14.

While we agree that the Commission's Regulations permit an individual to receive contributions before becoming a candidate, we do not feel that fact has any bearing on our proposed actions.

The Regulations define earmarking as a "designation, instruction, or encumbrance ... which results in ... a contribution or expenditure being made on behalf a clearly identified candidate or candidate's authorized committee." 11 C.F.R. § 110.6(b). While § 110.6 could contain provisions for earmarks to individuals who have not yet become a candidate, it does not. Therefore, the earmarking provisions, including the requirement

that earmarked contributions be forwarded within 10 days of receipt (11 C.F.R. § 102.8(a); 110.6(b)(2)(iii)) do not apply unless and until the individual named as a Prospective Candidate becomes an actual candidate as defined by the Act and Regulations. Thus, this provision, as all Commission regulations, must be read literally and these provisions can not apply, *by its terms*, unless and until there exists an authorized committee to receive such contributions. This literal approach to interpreting Commission regulations is best illustrated in Advisory Opinion 1999-4 where the Commission determined that an unregistered local party committee was not affiliated with a state party committee because the Commission's regulations only considered affiliation between two "political committees." Since one of the entities in the request had not qualified as a "political committee" the Commission's regulations were literally read to preclude affiliation between the two entities until such time that both entities qualified as political committees.

A candidate is defined as "an individual who seeks nomination for election, or election to federal office" (11 C.F.R. § 100.3(a)) who meets one of four clear monetary conditions:

1. An individual can collect collection contributions or make expenditures aggregating in excess of \$5,000. 11 C.F.R. § 100.3(a)(1).
2. An individual can give his or her consent to another person to receive contributions or make expenditures on his or her behalf and such person receives contributions or makes expenditures aggregating in excess of \$5,000. 11 C.F.R. § 100.3(a)(2).
3. If any other person has received contributions or made expenditures aggregating in excess of \$5,000 on the individual's behalf and, within 30 days of written notification by the Commission, the individual fails to disavow such activity. 11 C.F.R. § 100.3(a)(3).
4. If the aggregate of contributions received or expenditures made in any combination of the three aforementioned ways exceeds \$5,000. 11 C.F.R. § 100.3(a)(4).

Until and unless one of these conditions are met, and an individual files paperwork that indicates that he or she is a candidate and authorizes a primary campaign committee, an individual is not a candidate under the Act and Regulations. The fact that an independent political committee solicits contributions for an individual who is not yet a candidate for that individual's prospective candidacy does not trigger application of any of the above conditions, and therefore, does not change his or her status as a candidate. Therefore, Commission regulations do not require a political committee that independently raises funds for such an individual to forward contributions raised on their behalf until and unless he or she qualifies as a candidate.

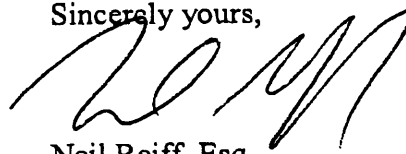
In Advisory Opinion 2003-23, a draft opinion from the Office of the General Counsel ("OGC") concluded that the requestor had to forward contributions within 10 days of receipt. In that request, the Commission was considering a similar proposal to our request in which a non-connected PAC was raising funds for the presumptive nominee for the Democratic nomination for President in 2004. In the OGC's Draft Opinion, the General Counsel's Office concluded that the Commission had no authority to "suspend" the 10 day rule and attempted to supersede Advisory Opinion 1982-23. The Commission correctly rejected the OGC Draft and concluded that the 10 day rule should be tolled until such time as the contingencies of the requestor's solicitations were met. The Commission must take the same approach in this matter.

To be sure, the purpose of the 10 day rule is one of disclosure. It is designed to ensure that persons do not hold contributions for the purpose of avoiding disclosure. *See* S. Rep 92-229, 92<sup>nd</sup> Congress, 1<sup>st</sup> Sess. 57 (June 21, 1971). In this instance, the receipt of such contributions will be disclosed by the recipient committee, ActBlue, as well as the fact that the contribution was earmarked for the prospective candidacy of the individual for whom it was solicited. If and when that individual qualifies as a candidate under the Act, the contributions will be forwarded within ten days and this transfer will be disclosed on ActBlue's disclosure reports. As in Advisory Opinion 2003-23, in the event that the individual does not qualify as a candidate, ActBlue has chosen a "contingent" beneficiary of the contribution and will forward the contribution to that beneficiary within 10 days of a date certain that the individual does not file papers indicating that they are a candidate for federal office within seven days of the 2008 Democratic National Convention.

Therefore, as with the situations described by Advisory Opinions 1977-16, 1982-23 and 2003-23, we feel that the 10-day limit on transfers of earmarked contributions for such a Prospective Candidate must be tolled until such time as the Prospective Candidate actually qualifies as a candidate.

Therefore we ask that the Commission modify the Draft Advisory Opinion and conclude, similar to Advisory Opinion 2003-23, that the 10 day rule found in 11 C.F.R. § 102.8 is not applicable until such time that an individual becomes a federal candidate.

Sincerely yours,



Neil Reiff, Esq.  
Attorney for ActBlue

Cc: Jonathan Zucker, Esq.  
Senior Strategist and Counsel  
ActBlue  
P.O. Box 382110  
Cambridge, MA 02138